Supreme Court, U.S.
FILED
FEB 7 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-664

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

FRANK YOUNG, Commissioner of Food and Drugs,
Petitioner,

v.

COMMUNITY NUTRITION INSTITUTE, *et al.*,
Respondents.

**On Writ of Certiorari To
The United States Court Of Appeals
For the District Of Columbia Circuit**

BRIEF OF SOUTH CAROLINA AS AMICUS CURIAE IN SUPPORT OF PETITIONER

PHILIP C. OLSSON
(Counsel of Record)
DENNIS R. JOHNSON
OLSSON AND FRANK, P.C.
1029 Vermont Avenue, N.W.
Suite 400
Washington, D.C. 20005
(202) 789-1212
Counsel for the State of South Carolina

Of Counsel:
T. TRAVIS MEDLOCK
Attorney General
BROOKS SHEALY
Assistant Attorney General
STATE OF SOUTH CAROLINA
OFFICE OF THE ATTORNEY GENERAL
P.O. Box 11549
Columbia, South Carolina 29211
(803) 758-2072

Dated: February 7, 1986

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

TABLE OF CONTENTS

	Page
STATEMENT OF INTEREST OF THE AMICUS CURIAE ..	1
A. Statement of Facts	2
B. Proceedings Below	4
SUMMARY OF ARGUMENT	5
I. TOLERANCES ARE NOT REQUIRED FOR FOODS WHICH CONTAIN INNOCUOUS LEVELS OF POISONOUS OR DELETERIOUS SUBSTANCES	6
A. Section 402(a)(1) Is The Centerpiece Of The Act's Adulteration Provision	6
B. Section 406 Does Not Totally Address The Problem Of All Poisonous Or Deleterious Substances	8
C. Tolerances Are Only Required When The Level Of A Contaminant Renders The Product Adulterated Under 402(a)(1)	10
II. INNOCUOUS LEVELS OF POISONOUS OR DELETERIOUS SUBSTANCES DO NOT AS A MATTER OF LAW RENDER FOODS CONTAINING SUCH SUBSTANCES ADULTERATED	12
III. THE COURT OF APPEALS, BY IGNORING SECTION 402(a)(1) AND THE SUPREME COURT'S DECISION IN *LEXINGTON MILL*, MISCONSTRUED FDA'S ACTION IN THIS CONTROVERSY	13
IV. THE COURT OF APPEALS DECISION THREATENS SOUTH CAROLINA'S ABILITY TO PROTECT ITS CITIZENS	14
A. The Decision Increases Risk To Public Health Of The Citizens Of South Carolina	14
B. The Court Of Appeals Decision Denies Guidance To The States	15
CONCLUSION	16

TABLE OF AUTHORITIES

CASES	Page
Flemming v. Florida Citrus Exchange, 358 U.S. 153 (1958)	*passim*
United States v. Lexington Mill & Elevator Co., 232 U.S. 399 (1914)	*passim*
STATUTES	
Federal Food, Drug, and Cosmetic Act, 21 U.S.C. 301 *et seq.*:	
§ 301(a), 21 U.S.C. 331(a)	14
§ 301(k), 21 U.S.C. 331(k)	14
§ 402(a)(1), 21 U.S.C. 342(a)(1)	*passim*
§ 402(a)(2)(A), 21 U.S.C. 342(a)(2)(A)	8, 9, 10
§ 406, 21 U.S.C. 346	*passim*
§ 408, 21 U.S.C. § 346a	6
§ 409, 21 U.S.C. § 348	7
§ 701(e), 21 U.S.C. 371(e)	4
§ 706, 21 U.S.C. 376	7
34 Stat. 769 (1938)	7
68 Stat. 517 (1954)	10
72 Stat. 1788 (1958)	10
74 Stat. 404 (1960)	10
MISCELLANEOUS	
39 *Fed. Reg.* 42748 (1974)	3
46 *Fed. Reg.* 74471 (1981)	4
Websters New Collegiate Dictionary (7th ed. 1969)	11

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-664

FRANK YOUNG, Commissioner of Food and Drugs,
Petitioner,

v.

COMMUNITY NUTRITION INSTITUTE, *et al.*,
Respondents.

**On Writ Of Certiorari To
The United States Court Of Appeals
For The District Of Columbia Circuit**

BRIEF OF SOUTH CAROLINA AS AMICUS CURIAE IN SUPPORT OF PETITIONER

STATEMENT OF INTEREST OF THE AMICUS CURIAE

On September 19, 1980, the State of South Carolina, together with its sister States of North Carolina and Virginia, formally petitioned the United States Food and Drug Administration (FDA) to approve a plan for the controlled and safe distribution of corn containing trace amounts of aflatoxin, a mold by-

product which develops on corn in the field. This plan would limit distribution of such corn to use in feed for mature, non-lactating livestock and poultry. Since scientific evidence establishes that corn containing low levels of aflatoxin can be safely used for these purposes, FDA approved the plan.

Community Nutrition Institute and others filed suit challenging this FDA action. South Carolina has appeared as *Amicus* supporting FDA in both the District Court and Court of Appeals proceedings. Although FDA's action was sustained by the District Court, the Court of Appeals found otherwise. The Court of Appeals held that FDA can allow shipment of product bearing a contaminant, such as aflatoxin, only if FDA first establishes formal tolerances pursuant to 406 of the Federal Food, Drug, and Cosmetic Act (FDCA or Act), 21 U.S.C. § 346.

South Carolina is seriously concerned that, if this decision is upheld, the public health of the citizens of South Carolina will be jeopardized, added regulatory burdens on South Carolina will be imposed, and South Carolina's ability to coordinate with FDA on regulatory matters of common concern will be hindered. Thus, for the reasons and arguments which follow, South Carolina requests this Honorable Court to reverse the decision of the Court of Appeals.

A. Statement of Facts

Aflatoxin is a field contaminant that exists at very low levels on most field crops. However, not all levels of aflatoxin contamination pose a discernable risk to health. As with other environmental contaminants, FDA has made determinations on the basis of scientific evidence and its expertise as to what level of

aflatoxin contamination "may render it [the food] injurious to health." This is the adulteration standard under § 402(a)(1) of the Act, 21 U.S.C. § 342(a)(1).[1] FDA's determinations on the safety levels of environmental contamination of foods are commonly referred to as "action levels." In 1974, FDA published a general action level for aflatoxin on corn at 20 parts per billion (ppb). 39 *Fed. Reg.* 42748 (December 6, 1974).

In 1980, the corn crop of the Southeastern United States contained a higher than usual level of aflatoxin due to an unusual combination of early drought and late rains.[2] As a result of the unavoidable contamination, South Carolina, as well as two of its sister states, had to choose between obtaining FDA's cooperation in regulating the interstate use of corn with aflatoxin above 20 ppb or regulating the use and disposition of such corn solely within the border of the state. The States chose the first course.

South Carolina, together with North Carolina and Virginia, petitioned FDA to approve a plan for the controlled safe use of corn containing up to 100 ppb aflatoxin. Since corn with elevated levels of aflatoxin (100 ppb) can safely be used as feed for mature, non-lactating livestock and poultry, and since the States had adopted regulatory controls to ensure the corn would be used strictly for this purpose, the States submitted that corn with aflatoxin up to 100 ppb

---

[1]Under this section a food is adulterated "if it bears or contains any poisonous or deleterious substance which may render it injurious to health. . . ."

[2]Approximately 70% of the crop exceeded the existing aflatoxin action level of 20 ppb.

would not be adulterated. After reviewing the States' petition, FDA agreed and approved the plans. 46 *Fed. Reg.* 7447 (January 23, 1981).

Notwithstanding FDA's and the States' conclusion that the plan complied with the FDCA, Community Nutrition Institute (CNI) then filed a suit challenging the plan approvals. CNI argued that FDA's authority to approve the plan regarding distribution of corn bearing aflatoxin in amounts of 20 - 100 ppb for certain feed uses was improper unless the Agency resorted to formal, trial type rulemaking pursuant to §§ 406 and 701(e) of the FDCA, 21 U.S.C. §§ 346 and 371(e).

B. Proceedings Below

The United States District Court for the District of Columbia heard this case on cross motions for summary judgment and granted the motion filed by FDA. The court correctly ruled that § 406 did not mandate tolerances for innocuous levels of unavoidable poisonous or deleterious substances.

The United States Court of Appeals for the District of Columbia Circuit reversed, holding that any product containing even innocuous levels of a poisonous or deleterious substance violates the FDCA, and therefore FDA cannot allow or sanction the shipment of products containing such contaminant until it first promulgates a tolerance pursuant to §§ 406 and 701(e) of the FDCA. In effect, the Court of Appeals decision struck § 402(a)(1) from the FDCA and overruled this Court's decisions in *Flemming v. Florida Citrus Exchange*, 358 U.S. 153 (1958), and *United States v. Lexington Mill & Elevator Co.*, 232 U.S. 399 (1914).

SUMMARY OF ARGUMENT

In its decision, the court below ruled FDA must promulgate a formal tolerance pursuant to § 406 of the Act before it can "authorize" the shipment of products containing innocuous levels of environmental contaminants. This ruling is in error because the court failed to recognize the principal role of § 402(a)(1) of the Act; it is this section which prescribes the basic and general test of food adulteration. In *Lexington Mill & Elevator*, this Court held that under § 402(a)(1) the mere presence of a poisonous or deleterious substance does not render a product adulterated; rather the substance must be present in such a quantity that the finished product may pose a danger to public health. The court below ignored this precedent and rewrote § 402(a)(1) so that now the mere presence of a contaminant is sufficient to render a product adulterated.

In addition to minimizing the scope of § 402(a)(1), the court below placed undue emphasis on § 406 and the establishment of tolerances. As this Court recognized in *Flemming v. Florida Citrus Exchange*, the purpose of § 406 is only to give sanction to what otherwise would be adulteration under § 402(a)(1).

By failing to appreciate the statutory scheme, the court below failed to recognize what FDA did in the present controversy. FDA did not authorize the shipment of adulterated food; rather, FDA recognized the limited use of corn containing up to 100 ppb aflatoxin would not constitute adulteration under § 402(a)(1), because the permitted uses in feed for mature, nonlactating livestock and poultry would be in no way

injurious to health. Since such products were not adulterated, the requirement of § 406 tolerances was never triggered. In sum, FDA acted properly.

ARGUMENT

I. TOLERANCES ARE NOT REQUIRED FOR FOODS WHICH CONTAIN INNOCUOUS LEVELS OF POISONOUS OR DELETERIOUS SUBSTANCES

In the decision below, the Court of Appeals failed to grasp the significance and role of § 402(a)(1) of the Act which proscribes as adulterated any food that contains poisonous or deleterious substances which may render the food injurious to health. By recognizing the scope of § 402(a)(1) and its interplay with § 406 of the Act, it becomes clear that the Court of Appeals' decision was wrong as a matter of law.

A. Section 402(a)(1) Is The Centerpiece Of The Act's Adulteration Provision

Section 402(a)(1) provides that a food will be deemed adulterated "if it bears or contains a poisonous or deleterious substance which may render the food injurious to health." This provision stands "as the Act's broadest and most general test of food adulteration. . . ." *Flemming v. Florida Citrus Exchange*, 358 U.S. 153, 161 (1958). Indeed, since it is the general adulteration standard, it governs unless expressly displaced by a more specific provision.[3]

---

[3]Since 1938, Congress has adopted particular rules applicable to specific classes of substances which might be added to food, such as pesticides, food additives and color additives. In each case, Congress has exempted these substances from the general adulteration standard of § 402(a)(1). *See, e.g.*, § 408 of the FDCA, 21 U.S.C. § 346a (While a pesticide tolerance is in effect, the pesticide is exempt from § 402(a)(1)); § 409 of the FDCA, 21 U.S.C. § 348 (While a food additive regulation is in effect, the additive is exempt from § 402(a)(1)); § 706 of the FDCA, 21 U.S.C. § 376 (While a color additive listing regulation is in effect, the color additive is exempt from § 402(a)(1)). If § 402(a)(1) was not the general standard, these statutory exemptions of specific substances from its scope would be simply illogical.

This Court has interpreted the "may render it injurious to health" standard in *United States v. Lexington Mill & Elevator Co.*, 232 U.S. 399 (1914).[4] There, this Court stated that the mere presence of a poisonous or deleterious substance in food does not render the product adulterated; rather, the substance must be present *in such quantity* as may render it [the food] injurious to health.

> "This is the plain meaning of the words, and our view needs no additional support by reference to reports or debates, though it may be said in passing that the meaning which we have given to the statute was well expressed by Mr. Hayburn, Chairman of the Committee. . . . 'As to the use of the term "poisonous" let me state that everything which contains poison is not poison. It depends on the *quantity* and combination.' " Id. at 410 (emphasis added) (citation omitted).

Under the *Lexington Mill* test, the question of whether a product is adulterated is not as elementary as portrayed by the court below, *i.e.*, the court found

---

[4]The *Lexington Mill* case involved § 7 of the Pure Food and Drugs Act of 1906 (34 Stat. 769) which was the predecessor provision to the current § 402(a)(1) of the Act. The § 7 language, as interpreted by this Court in *Lexington Mill*, retained its applicability and vitality even after the 1938 revision. *See, e.g., Flemming v. Florida Citrus Exchange, supra*, 358 U.S. at 161.

the mere presence of an unavoidable poisonous or deleterious substance adulterates the food which bears the substance. As this Court recognized, a more in-depth analysis is required under § 402(a)(1) to assess the risk to health based on the level of the substance in the food. Since the Court of Appeals misconstrued the role of § 402(a)(1) and its standard for adulteration, it failed to discern that provision's relationship to § 406. Thus, the decision below also misapplied § 406 by holding a formal tolerance is always required for aflatoxin in corn.

B. Section 406 Does Not Totally Address The Problem Of All Poisonous Or Deleterious Substances

In addition to retaining the "may render it injurious" standard of the Food and Drugs Act of 1906, the 1938 revision to the Act added both a new § 406, "Tolerance for Poisonous Ingredients in Food (§ 406(a)) and Certification of Coal Tar Colors for Food" (§ 406(b)) and a new § 402(a)(2), proscribing as adulterated any food unsafe within the meaning of § 406.[5]

The language which was adopted in § 406(a) of the 1938 Act covering tolerances, was recodified in the current § 406 to provide in relevant part, that:

> "Any poisonous or deleterious substance added to any food, *except where such substances are required* in the production thereof *or cannot be avoided* by good manufacturing practice shall be deemed to be unsafe for the purposes of the application of Clause 2 of § 402(a); but when such substance is so required or cannot be avoided, the Secretary shall promulgate regulations limiting the quantity therein or thereon to such extent as he finds necessary for the protection of public health. . . . *While such a regulation is in effect . . . such food shall not . . . be considered to be adulterated within the meaning of Clause 1 of § 342(a) of this title.*" (Emphasis added.)

[5] Section 402(a)(2) as enacted in 1938 read:

"If it bears or contains an added poisonous or added deleterious substance which is unsafe within the meaning of § 406."

By its plain language, this provision addresses two specific circumstances. The first sentence provides that the addition of any *unnecessary* or *avoidable* poisonous or deleterious substance, in any amount, renders the product adulterated under § 402(a)(2)(A) of the FDCA. It is important to note that such products are adulterated under § 402(a)(2)(A), not the general "may render injurious" standard of § 402(a)(1).

The second clause of the first sentence states that where the substance is necessary for production or unavoidable *and* a tolerance is in effect, any product which contains such substances in excess of the tolerance is adulterated under § 402(a)(2)(A). Yet, the section does not expressly address those situations where the substance is unavoidable and no tolerance has been established. Since such a situation can exist, witness the present case, it is clear that § 406 does not address every possible type of food contamination with poisonous or deleterious substances. Thus, the question becomes under which circumstances of food contamination with poisonous or deleterious substances does § 406 mandate the promulgation of a formal tolerance.

C. Tolerances Are Only Required When The Level Of A Contaminant Renders The Product Adulterated Under § 402(a)(1)

The starting point for determining when tolerances are required is the interplay between § 402(a)(1) and § 406. As discussed above, § 402(a)(1) is the general adulteration standard which will govern, unless displaced by specific statutory exemptions. Since § 406 does not address unavoidable contaminants in the absence of a tolerance, § 402(a)(1) governs as a matter of statutory construction and common sense. This conclusion is supported by the obvious omission in § 406 which fails to define as "unsafe" unavoidable contaminants when no tolerance is in effect. Thus, the § 406 companion adulteration provision, § 402(a)(2)(A), is not triggered. Indeed, Respondents concede that in the absence of a tolerance established under § 406, § 402(a)(1) applies to poisonous or deleterious substances.[6]

---

[6]See, Respondents' *Opposition to Petition for Writ of Certiorari*, November 20, 1985, at 9. However, Respondents attempt to limit this concession by arguing that § 402(a)(1) is an interim provision to regulate poisonous or deleterious substances until a tolerance has been established under § 406. Such a position is unsupported in the statutory framework. *First*, § 402(a)(1) is not some uncodified provision, it is the topic sentence of the entire food adulteration provision, hardly a logical spot to place an interim provision. Indeed, as discussed above, it is the general test of adulteration. *Second*, when Congress has recognized the necessity of an interim provision, it has dealt with the issue in a separate provision which has not been codified within the Act. *See, e.g.*, 74 Stat. 404 (1960) (color additives); 72 Stat. 1788 (1958) (food additives); 68 Stat. 517 (1954) (pesticides). *Finally*, Respondents' position is flatly contradicted by this Court's opinion in *Flemming v. Florida Citrus Exchange*, where this Court recognized § 402(a)(1) as the broadest and most general adulteration standard, 358 U.S. at 161.

By recognizing § 402(a)(1) governs unavoidable contaminants not covered by tolerances, the purpose of § 406 becomes clear. The section authorizes FDA to establish tolerances to condone the presence of unavoidable poisonous or deleterious substances which otherwise would be adulterated under § 402(a)(1). This reading is supported by the plain statutory language and this Court's opinion in *Flemming*.

First, the very word "tolerance" indicates that Congress recognized what authority it granted FDA and when it should be exercised. The word "tolerance" is defined as "the allowable deviation from a standard." *Webster's New Collegiate Dictionary* (7th ed. 1969). By authorizing tolerances, Congress authorized FDA to allow deviation from the general adulteration standard of § 402(a)(1).

Second, the criteria for determining a tolerance level is more liberal than the general adulteration standard. Section 406 provides that in setting levels, FDA can consider the extent to which the contaminant cannot be avoided and the level necessary to protect the public health. This implies a balancing of the practicalities not permitted under § 402(a)(1). Such language would allow levels beyond which "may render the product injurious to health."

Third, the second sentence of § 406 exempts products for which a tolerance has been established from the general adulteration provision.[7] Only if the pur-

---

[7]The language reads:

> "While such a regulation is in effect. . .such food shall not. . .be considered to be adulterated within the meaning of clause (1) of § 342(a) of this title."

pose of the tolerance is to condone that which is adulterated would it make any sense to exempt products for which a tolerance has been established from the general adulteration standard.

Finally, the above reading is supported by this Court's opinion in *Flemming v. Florida Citrus Exchange*. There, the Court held that § 406 carved out specific exemptions to the general adulteration provision found in § 402(a)(1). This Court found that the:

> "Existence of a tolerance is specifically stated in § 406(a) [currently 406] *only to give sanction to what would otherwise amount to adulteration within the terms of § 402(a)(1).*" 358 U.S. at 166 (emphasis added).

Accordingly, to determine whether FDA was required to proceed by formal tolerance in temporarily amending the aflatoxin in corn action level, it must be determined whether corn used as feed for mature, non-lactating livestock and poultry violates § 402(a)(1), as interpreted by this Court in *Lexington Mill*

II. INNOCUOUS LEVELS OF POISONOUS OR DELETERIOUS SUBSTANCES DO NOT AS A MATTER OF LAW RENDER FOODS CONTAINING SUCH SUBSTANCES ADULTERATED

The fatal flaw of the Court of Appeals reasoning is the presumption that any amount of a poisonous or deleterious substance renders the food adulterated. Pet. App. 7a. However, this presumption runs contrary to the language of § 402(a)(1) of the FDCA, as interpreted by this Court in *Lexington Mill.*

The question of whether the quantity of the contaminant is such that the substance may render it [the food] injurious to health and in violation of §

402(a)(1), is a question of scientific analysis requiring consideration of the substance's level in the food and its toxicological significance. The Court of Appeals, in holding that a food which contains any level of a contaminant is adulterated as a matter of law, wrote § 402(a)(1) out of the statute and overturned the *Lexington Mill* decision.

III. THE COURT OF APPEALS, BY IGNORING SECTION 402(a)(1) AND THE SUPREME COURT'S DECISION IN *LEXINGTON MILL*, MISCONSTRUED FDA'S ACTION IN THIS CONTROVERSY

The court below erroneously concluded that a major portion of the 1980 South Carolina corn crop was adulterated because it contained low levels of aflatoxin, *i.e.*, between 20 - 100 ppb. From this mistaken assumption, the court mandated that FDA was required to regulate this commodity by establishing a formal tolerance. The Court of Appeals erroneously concluded that FDA by raising the aflatoxin action level to a maximum of 100 ppb for certain animal feed purposes was "condoning" a violation of the Act.

However, this holding misconstrues what FDA actually did. FDA had focused on whether corn containing up to 100 ppb of aflatoxin, when strictly limited to uses in animals feed for mature, non-lactating livestock or poultry would pose a risk to health. On the basis of FDA's scientific review, it determined that corn containing up to 100 ppb aflatoxin could be safely used for this limited purpose. By making such a finding, FDA concluded that the corn for the limited purpose was *not* adulterated under § 402(a)(1).[8]

---

[8]It is important to emphasize FDA did *not* modify its general

Since the South Carolina corn was found not to be adulterated, the tolerance setting procedures of § 406 were never called into play. Thus, FDA was not mandated to establish a tolerance since there was simply no violation to "condone." *Flemming v. Florida Citrus Exchange*, 358 U.S. at 167.

IV. THE COURT OF APPEALS DECISION THREATENS SOUTH CAROLINA'S ABILITY TO PROTECT ITS CITIZENS

A. The Decision Increases Risk To Public Health Of The Citizens Of South Carolina

The effect of the Court of Appeals decision is to prohibit the shipment in interstate commerce of any food which contains any level of an unavoidable poisonous or deleterious substance. In an effort to protect the public health, the Court of Appeals has actually jeopardized it. The shipment in interstate commerce of an "adulterated" food is prohibited under the FDCA.[9] Thus, contaminated agricultural commodities, "adulterated" under the Court of Appeals' decision, must remain within the state of their origin, and states, such as South Carolina, would be responsible for the entire regulatory burden of ensuring the safe use of the product. This would be virtually impossible for a state such as South Carolina because

action level for corn (20 ppb) applicable to all uses of corn, *i.e.* human use. This general level would apply to corn unless specifically exempted for the special use as feed of mature nonlactating livestock and poultry.

[9]FDA's authority to regulate or prohibit the shipment of adulterated food is limited to either the interstate shipment of the product or movement of the components of the food product in interstate commerce. See §§ 301(a) & (k) of the FDCA, 21 U.S.C. § 331(a) & (k).

no one state could necessarily consume the millions of pounds of a raw agricultural commodity dedicated to safe uses in animal feed.

The Court of Appeals stated that these problems could be overcome if FDA established tolerances. Ignoring the question of whether tolerances can take many years to be established, a tolerance lacks the flexibility either to respond to a request for modification in light of unforeseen circumstances, such as the South Carolina 1980 request, or to tighten the tolerances in light of new scientific data to better protect the public health. States, such as South Carolina, should not be forced to wait many years to obtain FDA guidance as to whether a perishable product violates § 402(a)(1); nor should the public be exposed to ten years of unsafe use while a formal tolerance is being revised to reflect new scientific data showing the substance to be more harmful than first perceived.

B. The Court Of Appeals Decision Denies Guidance To The States

In the past, South Carolina has come to rely on FDA's expertise and resources in determining what constitutes adulteration under § 402(a)(1). However, the Court of Appeals decision would prohibit FDA from giving guidance in this area since such guidance could be construed as an "impermissible action level." It is unsound public policy to prohibit Federal and State agencies from exchanging information to better serve the public health. Because the agricultural and food industries operate on a national level, food safety questions are often best solved on the national level. Denying the States the ability to work with FDA to solve a food safety problem balkanizes solutions,

makes them less than adequate and places the public health in jeopardy.

CONCLUSION

For the above reasons, the State of South Carolina respectfully requests this Honorable Court to reverse the decision of the Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

PHILIP C. OLSSON
(Counsel of Record)
DENNIS R. JOHNSON
OLSSON AND FRANK, P.C.
1029 Vermont Avenue, N.W.
Suite 400
Washington, D.C. 20005
(202) 789-1212
Counsel for the State of South Carolina

Of Counsel:
T. TRAVIS MEDLOCK
Attorney General
BROOKS SHEALY
Assistant Attorney General
STATE OF SOUTH CAROLINA
OFFICE OF THE ATTORNEY GENERAL
P.O. Box 11549
Columbia, South Carolina 29211
(803) 758-2072

Dated: February 7, 1986